84-696

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

AMERICAN TRUCKING ASSOCIATIONS, INC., and TIDEWATER MOTOR TRUCK ASSOCIATION,

Petitioners,

and

NATIONAL LABOR RELATIONS BOARD; HOUFF TRANSFER, INC.; INTERNATIONAL ASSOCIATION OF NVOCCS; AMERICAN WAREHOUSEMEN'S ASSOCIATION; and INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondents,

vs.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals apply the proper legal criteria in determining that all the work sought by the Rules on Containers is historically and functionally related to traditional longshore work?

2. Did the Court of Appeals properly disregard the restrictions imposed by maritime law in determining that the employers of longshoremen have a right to control the disputed work for the longshoremen's benefit?

PARTIES BELOW

The proceeding in the court whose judgment is sought to be reviewed involved four consolidated cases. The caption of this petition for certiorari reflects the parties in Case No. 83-1185(L).[1]

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[1] Other parties in the other consolidated cases (Case Nos. 83-1214, 83-1424 and 83-1486) include: International Association of NVOCCs; Florida Custom Brokers and Forwarders Association, Inc.; Twin Express, Inc.; International Container Express, Inc.; San Juan Freight Forwarders, Inc.; Chester, Blackburn & Roder, Inc.; Eagle, Inc.; Eller & Company, Inc.; Harrington & Company, Inc.; Strachen Shipping Company and Marine Terminals, Inc.; Coordinated Caribbean Transport, Inc.; International Longshoremen's Association, Locals 333, 846, 862, 921, 953, 970, 1248, 1355, 1416, 1416-A, 1429, 1458, 1526, 1526-A, 1624, 1680, 1736, 1783, 1784, 1819, 1840, 1922 and 1970, AFL-CIO; International Longshoremen's Association, Atlantic Coast District Council, AFL-CIO; International Longshoremen's District Council, Baltimore, Maryland; International Longshoremen's Association, Hampton Roads District Council, AFL-CIO; Hampton Roads Shipping Association; and Southeast Florida Employers Port Association.

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IN THE

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NO. _____

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American Trucking Associations, Inc., and Tidewater Motor Truck Association (ATA and TMTA)[2] petition for a writ of

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[2] Petitioner ATA, the national association of the motor carrier industry, represents affiliated members involved in the three major segments of

certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 734 F.2d 966 and may be found in the Joint Appendix of Petitioners at 1-34.[3] The Decision and Order of the National Labor Relations Board in *International Longshoremen's Ass'n (Dolphin Forwarding, Inc.)*, (*Dolphin II*) is reported at 266 NLRB 230 (1983) and may also be found in the Joint Appendix at 35-64.

JURISDICTION

The Judgment of the Court of Appeals was entered on May 9, 1984. The Petition for Rehearing and Rehearing In Banc, filed by ATA and TMTA on May 23, 1984, was denied by the Court of Appeals on July 31, 1984. Jt. App. 31-34. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

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the land surface cargo transportation industries — trucking, warehousing, and non-vessel operating common carrier (NVOCC) operations. Petitioner TMTA is an affiliate of ATA whose members are located in the Port of Hampton Roads, Virginia. Other opponents of the Rules are The International Association of NVOCCs (IANVOCCs), the national association of NVOCCs; the American Warehousemen's Association (AWA), the national association of warehousemen; Houff Transfer, Inc. (Houff) a motor carrier; and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters), a labor organization whose affiliate locals represent employees of motor carriers, warehousemen and NVOCCs.

[3] Cited hereinafter as "Jt. App. ——." Petitioners ATA and TMTA, International Ass'n. of NVOCCs, American Warehousemen's Ass'n., and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America have joined in the preparation of the Joint Appendix.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (29 U.S.C. § 151 *et seq.*) (NLRA) are as follows:

Section 8(b), 29 U.S.C. § 158(b), provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents –
>
> 4(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is:
>
> • • •
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful . . . any primary strike, or primary picketing; . . .

Section 8(e), 29 U.S.C. § 158(e), provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . .

The relevant portions of the maritime laws include the Shipping Act of 1984, Public Law No. 98-236, 98 Stat. 67 (March 20, 1984), the Maritime Labor Agreement Act of 1980, 46 U.S.C. § 801 *et seq.*, the Interstate Commerce Act,

49 U.S.C. § 2, and the Shipping Act, 1916, 46 U.S.C. §§ 812 and 814. These statutes may be found in the Joint Appendix at 259-81.

STATEMENT OF THE CASE

This Petition seeks review of a decision by the United States Court of Appeals for the Fourth Circuit affirming in part and reversing in part a decision by the NLRB in *Dolphin II*, which arose out of a remand by this Court in 1980 of an earlier decision of the Board[4] on the same subject matter. *NLRB* v. *International Longshoremen's Ass'n*, 447 U.S. 490 (1980) (*ILA*).

The subject of this litigation is the legality of the Rules on Containers (Rules) negotiated by the International Longshoremen's Association (ILA) with the Council of North Atlantic Shipping Associations (CONASA) and the New York Shipping Association (NYSA) acting as agents on behalf of vessel operating common carriers and stevedoring companies (colectively called VOCCs or Steamship Lines) which employ longshoremen. The central issue is whether the Rules advance lawful primary or unlawful secondary objectives within the meaning of §§ 8(b)(4)(B) and 8(e) of the NLRA.

The Rules seek to secure for ILA-represented longshore labor working at seaport terminals on the East and Gulf Coasts of the United States the initial loading ("stuffing") and unloading ("stripping") of containers owned or under primary lease by Steamship Lines within 50 miles of the seaports. In *ILA* the Supreme Court remanded two cases wherein the Board had held that the Rules unlawfully covered the work of loading and unloading containers performed off-pier, because the Board had incorrectly focused on the lack of ILA off-pier work traditions. The Court directed the Board on remand to

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[4] *International Longshoremen's Ass'n. (Dolphin Forwarding, Inc.)*, 236 NLRB 525 (1978) (*Dolphin I*).

focus on the ILA's on-pier work traditions in evaluating the true objectives of the Rules.

The two cases remanded by the Supreme Court were consolidated by the NLRB with six other cases pending before *ILA* and a new case initiated by ATA and TMTA alleging unlawful enforcement of the ILA's Rules in January of 1981, following the Court's Remand Order and before the Board reconsidered the case.[5] In his decision in the consolidated remand cases on September 29, 1981, Administrative Law Judge Joel A. Harmatz (ALJ), found that the Rules had a lawful primary work objective of preserving for longshoremen the work of loading and unloading certain containers, but held that the Rules had an unlawful objective as applied to certain other containers.

The distinctions between the types of businesses involved in this dispute and the types of container work performed are important to an understanding of the merits of this case. The Steamship Lines transport both loose bundles of cargo, known as break bulk cargo, and containers filled with cargo. Steamship Lines and terminal company operators contract with stevedoring companies, employing ILA labor, to perform the work of handling break bulk and containerized cargo between the ocean cargo vessels and the trucks which haul the cargo away from the piers. Motor carriers frequently haul the cargo from the piers to freight stations located within the 50 mile zones for reconsolidation and redistribution based on destination, and vice versa. Sometimes cargo is taken to a local warehouse where it is stored for various lengths of

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[5] A § 10(1) injunction against further enforcement of the Rules pending final order of the Board was issued by the District Court and affirmed by the Court of Appeals. *Pascarell* v. *New York Shipping Ass'n, Inc.*, 650 F.2d 19, *cert. denied*, 454 U.S. 832 (1981). This injunction expired when the Board issued its remand decision. The Court of Appeals for the Fourth Circuit without opinion refused to grant a stay pending appeal; and likewise the Supreme Court without opinion refused to grant a stay by order of April 17, 1983.

time before reshipment at the customer's request. Non-vessel operating common carriers (NVOCCs) consolidate small shipments and acting as shippers contract with Steamship Lines to carry a single container abroad. All of these employers in the maritime and surface transportation industries compete with one another in certain aspects of their businesses. All have work traditions which precede the introduction of container technology. The ALJ found the identification of what work duties were historically performed by what labor force "is probably one that never was and never will be subject to clear isolation between marine carriers and those who use and complement their services." Jt. App. 94.

The two basic types of containerized cargo are less-than-full container load (LCL) containers, filled with small shipments from multiple shippers to either single or multiple consignees, and full-shippers-load containers (FSL) containers, filled with cargo from a single shipper to a single consignee. Jt. App. 84.

Judge Harmatz' decision turned on the distinction he found between LCL and FSL containers and the functional relationship between the work patterns associated with these containers and the traditional work patterns of longshoremen.[6] As regards LCL container work, Judge Harmatz held that the stuffing and stripping of all LCL containers by anyone other than the beneficial owner of the cargo within 50 miles of the piers may be preserved for longshoremen by the Rules. Judge Harmatz found that the consolidation and deconsolidation services offered by NVOCCs, motor carriers and warehousemen for LCL containers were related to ocean transport and constituted direct competition with the consolidation services offered by the Steamship Lines. Jt. App. 129, 131-32. Although

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[6] In *ILA* the Supreme Court said: "The work preservation doctrine, then, must also apply to situations where unions attempt to accommodate change while preserving as much of their traditional work patterns as possible." 447 U.S. at 506.

Judge Harmatz at no point specifically found that the work patterns surrounding the loading and unloading of FSL or LCL containers by NVOCCs, motor carriers and warehousemen were historically and functionally related to traditional ILA work patterns,[7] he found that, insofar as they applied to LCL container work, the Rules constituted "a rational effort to return to the piers, work diverted by inducements and a technology promulgated by signatory steamship companies and marine terminal operators." Jt. App. 129-30. The Board adopted these findings and conclusions. Jt. App. 57.

As regards FSL container work, Judge Harmatz held that the Rules could not lawfully be applied to the stuffing and stripping of FSL containers by motor carriers and warehousemen performed as an incident to the surface transportation of cargo. Judge Harmatz found that the stripping of containers at motor carrier freight stations for the purpose of transferring the cargo from containers to road equipment, a practice known as shortstopping, is "rooted in traditional motor carrier transport cargo handling procedure" and has "no relevance to the marine leg of the intermodel network." Jt. App. 134. Similarly, Judge Harmatz found that the stuffing and stripping of FSL containers by warehousemen as an incident to indefinite storage of at least part of the cargo is "an integral part of the surface distribution system not generally duplicated at portside marine operations." Jt. App. 141. The requirement

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[7] The Supreme Court in *ILA* mandated that in determining if the objective of the Rules is to preserve the work traditionally performed by ILA employees the tribunal has to:

> [E]valuate the relationship between traditional longshore work and the work which the Rules attempt to assign to ILA members . . . . The legality of the agreement turns, as an initial matter, on whether the historical and functional relationship between this retained work and traditional longshore work can support the conclusion that the objective of the agreement was work preservation rather than the satisfaction of union goals elsewhere. 447 U.S. at 509-10.

imposed by the Rules that warehousemen store their freight for a minimum of thirty days was found to be "an impediment to inland work practices which bear no relationship to services customarily or historically available at pier side." Jt. App. 141.

The Board affirmed Judge Harmatz' findings and conclusions as regards FSL container work by motor carriers and warehousemen, but advanced a different rationale. In the Board's view, the application of the Rules to the FSL container work performed by motor carriers and warehousemen was unlawful because "the duplicative work of the longshoremen, in handling cargo which is then rehandled by truckers and warehousemen, no longer exists as a step in the cargo-handling process." Jt. App. 59.

Ignoring the reasoning of both Judge Harmatz and the Board, the Court of Appeals failed to distinguish between LCL and FSL containerwork. Rather, the Court of Appeals held that *all* the work sought by the Rules was historically and functionally related to traditional ILA work. Jt. App. 25. Without further analysis of traditional work patterns, the court justified this holding with the simplistic observation that:

> [T]raditionally, longshoremen loaded cargo piece by piece into the hold of the ship and unloaded it piece by piece from the hold. The Rules grant them the right in certain instances to load cargo piece by piece into containers and unload it piece by piece from containers. In short, containerization has simply changed the locus of the work, moving the operation shoreward. Jt. App. 25.

Based on this logic the Court of Appeals held that the Rules were lawful in their entirety.

ARGUMENT

A. The Decision of the Court of Appeals Conflicts With the Decision of this Court in *ILA*

1. The Holding That There Can Be No Finding of Secondary Intent Absent Proof That Motor Carriers Lost Work Conflicts With *ILA*.

The Court of Appeals held that the Rules cannot be unlawful in any respect absent proof they deprive off-pier motor carriers and warehousemen of work. Disagreeing with the Board's conclusion that loading and unloading FSL containers by motor carriers and warehousemen was work beyond the lawful reach of the Rules, the Court of Appeals said:

> [T]he Board conspicuously failed to ground this conclusion of law [the Rules had an "unlawful work acquisition" objective] in the only finding of fact that might support it: that the Rules, in preserving for ILA members the right to do this initial loading and unloading, somehow deprived the truckers and warehousemen of *their* off-pier work *by transferring all or some of it to longshoremen at the pier*. . . Prior to containerization, truckers and warehousemen handled the cargo break-bulk; unloading of the cargo from the hold of the ship by the longshoremen obviously did not hinder these off-pier practices. Thus, one cannot possibly maintain that the stripping of import containers at the pier would in any way prevent the identical off-pier work. To repeat, truckers and warehousemen do precisely what they did before the change in technology; *the longshoremen have acquired none of that work*. Although the longshoremen's work in this process may well duplicate the off-pier work of truckers and warehousemen, calling this set of circumstances "work acquisition" strikes us as particularly inappropriate. Jt. App. 27-28 (Emphasis added)

Thus, the Court of Appeals considered that unless work was taken away from another employer and returned to the

bargaining unit by the work preservation agreement to replace bargaining unit work eliminated by the technological advancement there can be no unlawful work preservation agreement.

In so holding the Court of Appeals misapplied the mandate of *ILA* and the principles of *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612 (1967) and *NLRB* v. *Enterprise Ass'n of Steam Pipefitters, Local 638*, 429 U.S. 507 (1977). The Supreme Court clearly rejected the work transfer rationale when it recognized that this transportation case was a model of work preservation never before dealt with. In this model there was no work transfer, per se;[8] there was total elimination of work at the interface of the longshoremen and truckers. Jt. App. 59. With respect to this new model the Court said:

> The work preservation doctrine, then, must also apply to situations where unions attempt to accommodate change while preserving as much of their *traditional work patterns* as possible.
>
> • • •
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> Identification of the work at issue in a complex case of technological *displacement* requires a careful analysis of the *traditional work patterns* that the parties are allegedly seeking to preserve, and of how the agreement seeks to accomplish that result under the changed circumstances created by the technological advance. . . *More complex cases will require a broader view*, taking into account the *transformation* of several interrelated industries or types of work; this is such a case. *ILA*, 447 U.S. at 506-07. (Emphasis added).

Clearly, the Supreme Court wrestled with the relevance of "the utterly useless task of removing the contents and then

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[8] Such was the elementary model dealt with in *National Woodwork Manufacturers*, which involved work one employee group or the other would perform. 386 U.S. at 616.

repacking them . . . [which] is nothing less than an invidious form of "featherbedding" to block full implementation of modern technological process." *ILA*, 447 U.S. at 526-27 (dissenting opinion). If the Court had felt that the duplication of containerwork on the pier and at the motor carrier's freight station prevented the Rules from having a secondary objective, it surely would not have remanded the case in 1980. The Court of Appeals should have focused on the only legally relevant inquiry—whether or not the work sought by the Rules was functionally related to traditional ILA work patterns. If the disputed work is not functionally related to the traditional work patterns of the ILA, the Rules are unlawful whether or not some surface transportation company somewhere would also perform its traditional cargo handling functions.

The Court of Appeals placed undue emphasis on the concept of "work acquisition." This term has been used to help define an unlawful secondary objective; but it was never adopted by the Board or Courts as an independent legal test of compliance with § 8(b)(4) until adopted below by the Court of Appeals.

The proscribed secondary objective is established, according to the Act, by the pressure the ILA placed on the Steamship Lines to force them "to cease doing business with any other person," including motor carriers. Work preservation is permitted only where the union's conduct is not "tactically calculated to satisfy [its] objectives elsewhere," whether or not those objectives are to deprive the employer with whom the real dispute existed of its work. *National Woodwork*, 386 U.S. at 644; *Enterprise Ass'n*, 429 U.S. at 528. The Supreme Court has also held that the object of a union's activity does not have to be the complete cessation of business; a violation occurs when a union coerces a neutral employer to merely change its method of doing business with a targeted employer. *NLRB* v. *Local* 825, *Operating Engineers*, 400 U.S. 297, 304 (1971). Since the enforcement of the Rules requires the Steamship Lines to cease doing business with motor car-

riers and other surface transportation companies by denying them containers off-pier, it is unnecessary and contrary to Supreme Court authority to examine the impact of such enforcement on the motor carriers and other employers targeted by the Rules.

However, even if such facts were relevant, the Court of Appeals hinges its no-work-acquisition conclusion on its erroneous conception that truckers and warehousemen within the 50 mile zones do not lose work when the Rules are enforced. The Court of Appeals concluded that "[o]ne cannot possibly maintain that the stripping of import containers at the pier would in any way prevent the identical off-pier work. To repeat, truckers and warehousemen do precisely what they did before the change in technology . . ." Jt. App. 28. This statement reflects the erroneous view that all motor carriers and truckers are fungible entities with each having the same interests. This view is unsupported by both logic and the record evidence.

The true and undisputed facts are that many individual affiliated members of ATA operating within the 50 mile zones will be financially devastated by the enforcement of the Rules because there will be no duplication of work opportunities. The undisputed testimony was that the enforcement of the Rules will not force container work back to the piers, but will instead force it completely out of the 50 mile zones. Jt. App. 294-302. The rehandling of break bulk cargo by some motor carrier somewhere in the heartland of America is not equivalent to the work lost by employees of a motor carrier or a warehouseman located in a port city. Warehousemen cannot move their warehouses inland. When cargo in containers is diverted beyond the 50 mile zones, due to enforcement of the Rules, the surface transportation companies within the 50 mile zones lose both the work of loading and unloading containers *and* their break bulk cargo handling work opportunities.

2. The Court of Appeals' Application of the Historical and Functional Relationship Standard Conflicts with *ILA*.

The ALJ did not specifically find that loading and unloading of LCL containers, primarily by NVOCCs, or FSL containers, by motor carriers and warehousemen, had a historical and functional relationship to traditional ILA work patterns. Instead, he held that: (a) The Rules "constitute[s] a rational effort to return to the piers, work diverted by inducements and a technology promulgated by a signatory of steamship companies and marine terminal operators, Jt. App. 129-30; (b) the work covered by the Rules was "fairly claimable" by longshoremen. Jt. App. 90, 130; and (c) "[c]ontainer handling . . . in direct competition with the maritime warehouse for short-range storage, is legitimately within the category of work subject to preservation by the ILA." Jt. App. 141-42.

In agreeing that the Rules had a general work preservation objective the Board relied only upon the work diversion theory:

> It is clear from the Administrative Law Judge's findings on consolidation that no new work was created for consolidators after containerization shipping began. Rather, a large part of the longshoremen's traditional work was *diverted* away from the pier to the consolidators. Therefore, the ILA had a lawful work preservation objective in claiming this work under the Rules. Jt. App. 58-59.

Thus, the Board clearly applied a legal concept of Steamship Line responsibility for the loss of container work by longshoremen because they had developed and adopted the container technology in the first place, Jt. App. 129-30, and they had published favorable tariff rates for the shipment of LCL cargo. Jt. App. 127.

The Supreme Court did not in *ILA* indicate that such legal concepts of work "diversion" should influence the application of the functional relationship test. The Court implicitly acknowledged that even though the Steamship Lines had helped develop container technology and had chosen to use it, nevertheless, if the work created by the new technology was not functionally related to traditional ILA work the Rules agreement was unlawful. If creation and use of container technology had been considered relevant the Court would surely have included this factor in the test it articulated in *ILA*. Its failure to do so is consistent with the majority holding in *Enterprise Ass'n*, that an employer which is party to a work preservation agreement does not lose its neutrality because it chooses to bid on work which it knows would violate the work preservation agreement. 429 U.S. at 531, dissent at 539.

Apparently recognizing that the Board had applied an erroneous legal concept of work diversion, the Court of Appeals ignored the work diversion theory and sought to justify the Board's conclusion that the Rules had a lawful work preservation objective by concluding:

> Not surprisingly, it [the Board] had little trouble finding that "the work of loading and unloading containers claimed by the Rules is functionally related to the traditional loading and unloading work of the longshoremen. Jt. App. 25.

The Court of Appeals rationalized this conclusion by likening a container to the hold of the ship and said that "containerization has simply changed the locus of the work by moving the operation shoreward." Jt. App. 25. No such factual conclution was reached by the ALJ or the Board. Furthermore, even if the locus of the work had moved shoreward, it did not leave the pier for purposes of this case. The ALJ found as a matter of fact that the traditional "jurisdiction of longshoremen began and ended at the tailgate of the truck." Jt. App. 105 n. 28. Thus, whether the longshoremen turns over break-

bulk cargo or containerized cargo to a motor carrier, traditional longshoremen's work patterns end at the interface between the two carriers.

The argument that the "locus of the work" had moved shoreward was a central argument presented to the Supreme Court in *ILA* by the proponents of the Rules.[9] In rejecting this argument in 1980, the Supreme Court recognized that the proper analysis had to go beyond a simple "matter of deciding whether a container is more like the hold of a ship [moved shoreward] or more like a big box [unloaded from a ship and turned over to a trucker]. 447 U.S. at 509 n. 23. This is so because "[t]he usefulness of a container lies precisely in the fact that it may function as an integral part of the hold while it is aboard a vessel, as a trailer when it is transported by truck, and as a part of a railroad car when it is carried by rail."[10] *Id.*

Judge Harmatz applied the proper legal standards in comparing the traditional longshoremen's "work patterns" with those of motor carriers and warehousemen handling FSL containers when he said:

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[9] ILA Brief p. 33-35.

[10] The ALJ found "that longshoremen were not the only casualties of the container revolution. A loss of work was also sustained among truckers and off-shore dockworkers. Yet the work of loading and unloading cargo is functionally indistinct whether the cargo unit be a container, tandem trailer, or vessel's hold. . ." Jt App. 121. The ALJ was referring to the physical work of loading and unloading containers by both the maritime and surface transportation industry workforces *after* the development of the technological advancement. The similarity of the physical work on containers by the two contesting workforces is not the comparison sought by the Supreme Court. Rather, it directed a comparison between the historical "work patterns" of longshoremen in "loading and unloading of ships" and the loading and unloading of modern shipping containers sought by the Rules. 447 U.S. at 509, 510.

> Although skills utilized therein are indistinct from those of deepsea longshoremen in the performance of their traditional duties, it is work assumed *for a different purpose*, and in a different segment of the transportation industry. Shortstopping is simply a carrier oriented, as distinguished from consumer oriented service, and as such neither competes with maritime cargo handling nor amounts to a subterfuge to oust longshoremen of their traditional work. To this extent, *upon delivery of a container to a motor carrier, the seaborne leg ends, the container becomes a substitute for the trailer or van, and the work beyond this interface was neither created by containerization nor does it make inroads on that traditionally made available to deepsea ILA labor by marine operators.* Jt. App. 135. (Emphasis added)

This is a clear holding that stripping and stuffing FSL containers is *not* historically and functionally related to traditional longshoremen's work. The ALJ should have reached the same conclusion regarding all container work sought by the Rules. For the Court of Appeals to hold that all container work is functionally related to traditional longshore work patterns because the hold of the ship had moved shoreword seriously conflicts with the mandate of *ILA* and usurps the authority of the Board to find that FSL container work is beyond the lawful reach of the Rules.

B. The Court of Appeals Has Decided an Important Question of Federal Law Which Should Be Settled By This Court

In *Enterprise Ass'n*, this Court held that a union violated Section 8(b)(4)(B) by attempting to enforce a work preservation clause against a subcontractor whose contractual obligation to the general contractor deprived him of the power to assign the disputed work. Since the subcontractor did not have a legal right to control the work for the benefit of the union, he was held to be a neutral target of forbidden secondary coercion.

Similarly, since the Federal Maritime Statutes prohibit the Steamship Lines from complying with the Rules, the Steamship Lines must be viewed as neutral secondary employers, and the enforcement of the Rules against them must be deemed a secondary boycott.

The Steamship Lines are not free to comply with the Rules because the Federal Maritime Statutes prohibit discrimination by these common carriers against the shipping public, including consolidators, motor carriers, warehousemen and their customers. Under long-established federal law, common carriers must offer *all* of their transportation equipment, including containers, all of which they own or have under primary lease, to the shipping public without unreasonable discrimination. *Interstate Commerce Commission* v. *Delaware L. & W. R. Co.*, 220 U.S. 235, 252 (1911) (discrimination by roalroads based on geographic location or ownership of cargo prohibited); *FMB* v. *Isbrandtsen Co.*, 356 U.S. 481 (1958) (discriminatory service prohibited); *Grace Line, Inc.* v. *FMB*, 280 F.2d 790 (2d Cir. 1960), *cert. denied*, 364 U.S. 933 (1961) (equal access to vessels required); *Flota Mercante Grancolombiana, S.A.* v. *FMC*, 302 F.2d 887 (D.C. Cir. 1962) (selective provisions of cargo space on exclusive contract basis prohibited); *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297 (1937) (contract rates for specified commodities unlawful); *California* v. *United*

States, 320 U.S. 577 (1944) (discrimination resulting from non-compensatory demurrage charges for wharf storage prohibited).

In *ILA*, this Court stated, "If the Board finds, on remand, that the Rules have a lawful work preservation objective, it will then, of course, be obliged to consider the charging parties' contention that CONASA members did not have the right to control the stuffing and stripping of containers." 447 U.S. at 511-12. This Court specifically noted petitioners' argument that the Steamship Lines are common carriers subject to government regulation and have no legal right to withhold containers or container services from their customers on a selective basis, and observed, "[t]hese contentions present difficult and complex problems which are not properly before us." 447 U.S. at 512.

Notwithstanding this Court's clear mandate, Judge Harmatz expressly refused to consider whether federal maritime law deprived the Steamship Lines of the requisite control over the work claimed by the Rules. Although Judge Harmatz perceived a "fundamental conflict between the national labor and transportation policies," he concluded that the "reconciliation of the conflict would seem beyond the province of the administrative agencies." Jt. App. 160, 172. The Board adopted Judge Harmatz' conclusion that "[e]ach administrative agency should confine itself to deciding those issues arising within its own statutory area of expertise, leaving any conflicts between national labor and transportation policies to be resolved by the courts." Jt. App. 171.

Ironically, the Court of Appeals also failed to come to grips with the impact of maritime law on the Steamship Lines' right to control the work claimed by the Rules. Although this Court in *ILA* had opined that the maritime law issue presented "difficult and complex problems," the Court of Appeals declared that the right of control argument "lacks any semblance of merit." Jt. App. 25. The Court of Appeals erroneously

asserted that the right of control argument rested on a decision by the Federal Maritime Commission, *Sea-Land Service Inc.— Proposed Rules on Containers*, 21 FMC 1 (1978), which had been vacated in *Council of North Atlantic Shipping Ass'n* v. *FMC*, No. 78-1776 (D.C. Cir. July 2, 1982).[11] Unlike the Court of Appeals, this Court recognized in *ILA* that the right of control argument did *not* depend solely on the *Sea-Land* decision, but rather rested on long-standing maritime law extending back to the Shipping Act, 1916. 447 U.S. at 512. The vacation of the FMC's order in *Sea-Land* did not nullify these statutory provisions. Furthermore, the FMC order discontinued proceedings in *Sea-Land only* on procedural grounds; the decision on the merits retains significance. In ordering the FMC to continue the proceedings, the D.C. Circuit did not hold that the Rules were lawful under maritime law. In fact, no agency and no court has ever held that the Rules are consistent with maritime law. Rather, the only entity ever to pass on this issue, the FMC, has repeatedly held that the Rules violate maritime law.[12]

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[11] The Court of Appeals erred in stating that the Court of Appeals vacated the FMC decision in *Sea-Land Service, Inc.* The FMC ruled before *ILA* that the Rules were unlawfully discriminatory in violation of the common carrier obligation. *Sea-Land Service, Inc. — Proposed Rules on Containers*, 21 FMC 1 (1978). After *ILA*, the Court of Appeals remanded the matter to the FMC to reconsider in light of *ILA* and *FMC* v. *Pacific Maritime Ass'n*, 435 U.S. 40 (1978). On May 27 1982, the FMC reaffirmed its decision that the Rules were unlawful and ordered the proceedings discontinued. On July 2, 1982, the Court of Appeals vacated *the order discontinuing the proceedings* and directed the Commission to defer action on *Sea-Land Service, Inc.* until it reached final decision in *"50 Mile Container Rules" Implementation by Ocean Common Carriers Serving U.S. Atlantic and Gulf Coast Ports — Possible Violations of the Shipping Act, 1916*, FMC No. 81-11. A hearing has been conducted, briefing is completed, and the decision of the Administrative Law Judge is pending.

[12] The FMC is investigating the lawfulness of the Rules under maritime law for the limited purpose of approving or disallowing proposed

The Court of Appeals concluded that the Steamship Lines possess the right to control the allocation of the work sought by the Rules simply because the Steamship Lines "own or lease the containers." The court's reliance on the bare fact of physical possession and control of the containers conflicts with long established statutory and Supreme Court precedent which prohibits a common carrier from making his equipment available on a discriminatory basis. The Court of Appeals rationale also conflicts with previous decisions of this Court and the Board which recognize that the right of control inquiry must examine an employer's *legal right* to award the disputed work, and not the employer's mere physical power, *NLRB* v. *Enterprise Ass'n of Steam Pipe Fitters, supra; Enterprise Ass'n, Local Union No. 638, 183 NLRB 516 n.2 (1970)* ("We agree with the Trial Examiner's conclusion that, at the time of Respondent's August, 1969 activities, Courter was not neutral because 'there was no legal method by which Courter could comply with the union's demand to fabricate the pipe.'")

A new federal statute enacted by Congress subsequent to the decision of the Fourth Circuit herein reaffirms the maritime principles which deny the Steamship Lines the right to control containers in the manner dictated by the Rules. The Shipping Act of 1984, Public Law No. 98-236, 98 Stat. 67 (March 20, 1984), Section 5(e), provides:

> This Act, the Shipping Act, 1916, and the Intracoastal Shipping Act, 1933, do not apply to maritime labor agreements. *This subsection does not exempt from this Act, the Shipping Act, 1916, or the Intracoastal Shipping*

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tariffs which contain the Rules. The congressional decision to entrust this role to the FMC does not divest the courts of their authority and obligation to take judicial notice of maritime law when necessary to the resolution of the legal issues before them. Thus, this Court need not await yet another FMC ruling to determine the impact of maritime law on an employer's right to control work for purposes of Section 8(b)(4).

> *Act, 1933, any rates, charges, regulations, or practices of a common carrier that are required to be set forth in a tariff, whether or not these rates, charges, regulations, or practices arise out of, or are otherwise related to a maritime labor agreement.* (Emphasis added)

The Rules on Containers clearly are among the "practices of a common carrier that are required to be set forth in a tariff." 46 U.S.C. §§ 817, 844; *Council of North Atlantic Shipping Ass'n* v. *FMC*, 672 F.2d 171, 182 & nn. 96-98. Congress clearly knew of the existence of the Rules litigation. Thus, Section 5(e) of the Shipping Act of 1984 takes care to explicitly provide that the Shipping Acts of 1916 and 1933, upon which the Petitioners rely, do apply to the Rules notwithstanding the fact that they "arise out of . . . a maritime labor agreement."

In Section 10 of the Shipping Act of 1984, Congress again made clear its intent not to immunize the Rules from the restrictions imposed by maritime law. Section 10(b) provides, in relevant part, that "no common carrier . . . may . . . extend or deny to any person any privilege, concession, equipment, or facility except in accordance with its tariffs or service contracts." Furthermore, Section 10(c) provides:

> No conference or group of two or more common carriers may (1) boycott or take any other concerted action resulting in an unreasonable refusal to deal; [or] (2) engage in conduct that unreasonably restricts the use of intermodal services or technological innovations.

The ruling of the Court of Appeals permits a common carrier to evade its legal responsibility to provide service on a non-discriminatory basis merely by negotiating a collective bargaining agreement. This ruling invites the subversion of transportation law by unions and transportation companies inside and outside of the maritime industry. The Supreme Court should settle this important federal question in this case and thereby clarify the right to control principle.

C. This Case Has Great National Importance

The decision of the Court of Appeals resolves nine different Board proceedings involving about 34 ports on the East and Gulf coasts. Following the court's decision below, the Rules have been implemented in every one of these ports. Work opportunities for motor carriers, warehousemen, NVOCCs and their thousands of employees have been reduced.

This petition for certiorari may present this Court with its last opportunity to pass upon the legality of the Rules. To the extent the Board found the Rules lawful, no further complaints will issue, precluding the possibility of conflicts between the Circuits. Furthermore, the ILA and NYSA are currently seeking a writ of mandamus from the Court of Appeals which would enjoin the Board from issuing complaints or otherwise instituting administrative or judicial proceedings with respect to *any* aspect of the Rules as applied in *any* port of the United States. *International Longshoremen's Association* v. *Johansen*, No. 84-1973 (4th Cir. Petition filed September 17, 1984).

While the immediate impact of the Court of Appeals decision is great, its significance extends far beyond the Rules. As this Court recognized in *ILA*, the permissible bounds of work preservation activities presents "an important question of federal labor law." 447 U.S. at 493. The Court of Appeals' and Board's misapplication of this Court's standard for judging the permissibility of work preservation agreements will distort and confuse established doctrines unless clarified by this Court. Similarly, the Court of Appeals' conclusion that transportation law may be disregarded in determining an employer's right to control the instrumentalities of commerce establishes a dangerous precedent which this Court should correct.

CONCLUSION

The Petition for a Writ of Certiorari should be granted as to both questions presented.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-861

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*

No. 84-696

AMERICAN TRUCKING ASSOCIATIONS, INC., and
TIDEWATER MOTOR TRUCK ASSOCIATION,

Petitioners,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Respondents.

No. 84-677

AMERICAN WAREHOUSEMEN'S ASSOCIATION,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC., and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Respondents.

No. 84-869

HOUFF TRANSFER, INC.,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS.

BRIEF FOR RESPONDENTS

(Additional captions and names of attorneys appear on inside front cover)

No. 84-691

INTERNATIONAL ASSOCIATION OF NVOCCs; FLORIDA CUSTOMS BROKERS AND FORWARDERS ASSOCIATION, INC.; TWIN EXPRESS, INC.; and INTERNATIONAL CONTAINER EXPRESS, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Respondents.

No. 84-684

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Nos. 84-861, 84-696, 84-677,
84-869, 84-691, 84-684

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO, *et al.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

In the 117 pages of their six separate petitions, ten petitioners have been unable to assert a single reason why the Court should grant certiorari in this case. They have articulated no question of law requiring Supreme Court review.[1] They concede there is no conflict among the cir-

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[1] The questions framed in the petitions run the gamut from "[w]hether the National Labor Relations Board correctly concluded" (No. 84-861) to "[w]hether the court of appeals erred" (No. 84-684) to "[d]id the Court of Appeals apply the proper legal criteria" (No. 84-696) to "[w]as the Circuit Court correct in overturning the NLRB decision?" (No. 84-677). It is difficult to see how the answer to any of these questions would add to the development or clarification of federal labor law.

cuits.[2] Although they argue that the case is important, since it involves a major industry, they can point to no significant issue of law or policy that should be decided by the highest court. They cite no decision of this Court with which the Fourth Circuit's is in conflict.[3] They invoke an unknown ground for certiorari—"the last clear chance doctrine."[4] The entire thrust of the six petitions is dissatis-

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[2] Indeed, there would appear to be complete harmony. Every jurist who has defined the work in controversy as this Court did in *NLRB* v. *Int'l Longshoremen's Ass'n*, 447 U.S. 490 (1980), arrived at the same conclusion reached by the court of appeals below. *See Intercontinental Container Transport Corp.* v. *New York Shipping Ass'n*, 426 F.2d 884 (2d Cir. 1970); *Int'l Longshoremen's Ass'n (Consol. Express, Inc.)*, 221 N.L.R.B. 956, 979 (1975) (ALJ Arnold Ordman); *Int'l Longshoremen's Ass'n* v. *NLRB*, 537 F.2d 706, 712-14 (2d Cir. 1976) (Feinberg, J. dissenting), *cert. denied*, 429 U.S. 1041, *reh'g denied*, 430 U.S. 911 (1977); *Humphrey* v. *Int'l Longshoremen's Ass'n*, 401 F. Supp. 1401 (E.D. Va. 1975) (Merhige, J.), *rev'd*, 548 F.2d 494, 500-01 (4th Cir. 1977) (Craven, J. dissenting); *Consol. Express, Inc.* v. *New York Shipping Ass'n*, 452 F. Supp. 1024, 1040 n.14 (D.N.J. 1977) (Stern, J.), *modified on other grounds*, 602 F.2d 494 (3d Cir. 1979), *vacated and remanded*, 448 U.S. 902 (1980), *on remand* 641 F.2d 90 (3d Cir.), *mandamus and prohibition denied*, 451 U.S. 905 (1981); *Int'l Longshoremen's Ass'n* v. *NLRB*, 613 F.2d 890 (D.C. Cir. 1979), *aff'd*, 447 U.S. 490 (1980).

[3] The only conflict which the petition on behalf of the National Labor Relations Board (No. 84-861 Petition at 29) can conjure up is not with a decision of this Court but only with a "rationale." Certiorari may be appropriate if a conflict exists with a decision. Sup. Ct. R. 17.1(c). No authority, however, sanctions Supreme Court review for only a disagreement in rationale. Moreover, there is no conflict. The "rationale" to which the petitioner alludes is not that of this Court but of one of the litigants in an earlier case. The petition manufactures the putative rationale by extracting a single word, "eliminated," used by the Court to describe the contention raised by a party. *NLRB* v. *Int'l Longshoremen's Ass'n*, 447 U.S. 490, 510-11 (1980).

[4] Two petitions (No. 84-696 Petition at 22; No. 84-861 Petition at 22-23, 29-30) contend that this case will probably represent the last opportunity for this Court to review the Rules on Containers. These petitioners seem to be under the misimpression that the Supreme Court is now a standing tribunal to pass on this single

(footnote continued on following page)

faction with the result below. They ask the Court to eschew its proper function and to sit simply as another layer in the appellate process.

This Court has already established the legal principles that govern the decision in this case. *NLRB* v. *International Longshoremen's Association,* 447 U.S. 490 (1980). The Court of Appeals for the Fourth Circuit easily applied them to correct a patent error of law in the decision of the National Labor Relations Board. This Court had directed the Board to decide whether the work retained by the Rules, *i.e.*, the stuffing and stripping of carriers' containers at the piers, is the historical and functional equivalent of traditional longshore work. 447 U.S. at 507. The Board, affirming its administrative law judge, found that it is and so held that the Rules on Containers are lawful work preservation provisions (Petitioners' Appendix at 53a, 59a, 119a). The court of appeals affirmed (Petitioners' Appendix at 24a). This Court had directed the Board to decide whether the longshoremen's employers had the right to assign this work to them. The Board, again affirming its administrative law judge, found that the longshoremen's employers do have the right of control (Petitioners' Appendix at 51a-52a). Once more, the court of appeals affirmed (Petitioners' Appendix at 24a).[5]

(footnote continued from previous page)

collective bargaining agreement. Moreover, the Court in another context recently refused to credit the hobgoblin of a last chance attitude. *See United States* v. *Stauffer Chemical Co.*, —— U.S. ——, 104 S. Ct. 575, 78 L. Ed.2d 388, 395 n.6 (1984) (No. 82-1448). Petitioners in this case would have been well-advised to heed the Court's instruction that there is no need to "seek certiorari from adverse decisions when such action would otherwise be unwarranted" merely out of fear that no future opportunity will arise, especially since the Court let it be known that it would not alter its "practice of waiting for conflicts to develop before granting the government's petitions for certiorari." 78 L.Ed.2d at 395 n.6.

[5] Some of the petitioners urge that the ALJ, the Board and the court of appeals were all wrong in finding right of control (No.

(footnote continued on following page)

Having completed the task assigned by this court, the Board then wandered into a manifest error of law. Despite its holding that the Rules retain for longshoremen the functional and historical equivalent of their traditional work, the Board concluded that these same Rules were unlawful when applied to containers destined for short-stopping or warehousing (Petitioners' Appendix at 59a-60a). The Board predicated this determination upon the theory that an agreement to retain work that has been eliminated is unlawful. It attempted to lend credibility to this theory by affixing the label "work acquisition" to the challenged agreement, despite the absence of any factual finding that off-pier work functions were or could be transferred to the longshoremen.[6]

The court of appeals had no difficulty disposing of the Board's error. It applied longstanding and well-settled principles of federal labor law which leave no doubt that an agreement to retain work that technological change has

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84-691 Petition at 13-24; No. 84-696 Petition at 17-21). They claim that these tribunals should have taken into account the proscriptions of federal shipping law in determining the legality of the Rules under federal labor law. The approach suggested would require the NLRB to decide difficult questions arising under the shipping statutes which the Federal Maritime Commission, the agency to which Congress has entrusted this task, has not yet resolved. The legality of the Rules under federal shipping law is presently before the FMC. *See 50 Mile Container Rules*, FMC No. 81-11. These shipping law questions are hardly ripe for review by this Court.

[6] Some of the petitioners seek to supply the missing factual finding by constructing scenarios in which off-pier work might be lost (No. 84-861 Petition at 27-28; No. 84-869 Petition at 15; No. 84-696 Petition at 12; No. 84-684 Petition at 10 n.7). None of these hypothetical occurrences is alleged to have happened in fact. None was invoked by the Board as a basis for its decision. None is a necessary consequence of the Rules but comes about only as a result of the choice of off-pier employers.

eliminated as a necessary function is perfectly permissible primary activity (Petitioners' Appendix at 26a-29a).[7]

The plea for a "definitive resolution of the validity of the Rules" (No. 84-861 Petition at 28) is disingenuous. The Fourth Circuit's decision is definitive.[8] It brings the verdict on the Rules into congruence with the law enacted by Congress and elucidated by this Court. It puts to rest all uncertainties concerning the validity of the Rules and thus achieves the labor stability which the Board purportedly espouses. It is the Board which would prolong the discord, not to seek a definitive resolution but a favorable one.[9]

Litigation over the Rules on Containers over the past 15 years since their adoption has consumed an inordinate amount of judicial and administrative resources. It has

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[7] The bulk of every petition is devoted to an attempt to reargue the merits of the case before the Fourth Circuit. This is inappropriate in an application for a writ of certiorari and, accordingly, this brief will not respond in kind. However, respondents are appending their reply brief below, should the Court wish to know their position on the merits.

[8] The decision of a United States court of appeals is definitive, notwithstanding the Board's refusal to admit it. The NLRB makes no bones about its policy of disregarding decisions of federal appellate courts with which it is displeased. Although this policy has been strongly criticized by ten circuits, the Board persists. Its refusal to abide by the decision in this case, pending application to this Court, prompted respondents to petition for writs of mandamus and prohibition to compel the Board to comply by discontinuing further litigation it had initiated against the Rules in derogation of the decision of the court of appeals. *In re Int'l Longshoremen's Ass'n*, No. 84-1973 (4th Cir. filed Sept. 14, 1984).

[9] Inexplicably, the Board has indicated its intent (No. 84-861 Petition at 22 n.8) not to oppose the petitions which seek review of that portion of the decision below which sustained the validity of the Rules, where a unanimous court affirmed a unanimous Board in affirming its administrative law judge. With that kind of unanimity, one would think that those issues at least have been definitively adjudicated. It is difficult to reconcile the Board's willingness to reopen these issues with its goal of certainty and stability.

generated 13 circuit court, 14 district court and 10 NLRB proceedings, as well as two determinations on the merits by this Court. The decision of the court of appeals below has brought the wheel full circle. The status of the Rules on Containers is precisely where it was after the first ALJ found them to be lawful work preservation provisions almost a decade ago. *International Longshoremen's Association (Consolidated Express, Inc.)*, 221 N.L.R.B. 956, 979 (1975) (ALJ Arnold Ordman). The time has come to say "Enough!" The pique of disappointed litigants is no basis to add another unnecessary chapter. There is no reason for Supreme Court review. The petitions should be denied.

Dated: New York, New York
December 27, 1984

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ADDENDUM

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 83-1185(L)

AMERICAN TRUCKING ASSOCIATIONS, INC. and
TIDEWATER MOTOR TRUCK ASSOCIATION,

Petitioners,

and

HOUFF TRANSFER, INC., AMERICAN WAREHOUSEMEN'S ASSOCIATION and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenors,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Intervenors.

No. 83-1214

INTERNATIONAL ASSOCIATION OF NVOCCS, FLORIDA CUSTOMS BROKERS AND FORWARDERS ASSOCIATION, INC., TWIN EXPRESS, INC., and INTERNATIONAL CONTAINER EXPRESS, INC.,

Petitioners,

and

SAN JUAN FREIGHT FORWARDERS, INC.,

Intervenor,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 83-1424

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, HAMPTON ROADS DISTRICT COUNCIL; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ATLANTIC COAST DISTRICT COUNCIL; INTERNATIONAL LONGSHOREMEN'S DISTRICT COUNCIL BALTIMORE, MARYLAND; ILA LOCALS 333, 846, 862, 921, 953, 970, 1248, 1355, 1416, 1416A, 1429, 1458, 1526, 1526A, 1624, 1680, 1736, 1783, 1784, 1819, 1840, 1922, and 1970, AFL-CIO; HAMPTON ROADS SHIPPING ASSOCIATION; SOUTHEAST FLORIDA EMPLOYERS PORT ASSOCIATION; COORDINATED CARIBBEAN TRANSPORT, INC.; CHESTER BLACKBURN & RODER, INC.; EAGLE, INC.; ELLER & COMPANY, INC.; STRACHEN SHIPPING COMPANY; and MARINE TERMINALS, INC.,

Respondents.

SHIPPING GROUP'S REPLY BRIEF

No. 83-1486

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Petitioners,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

HOUFF TRANSFER, INC., INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, TIDEWATER MOTOR TRUCK ASSOCIATION, and AMERICAN TRUCKING ASSOCIATIONS, INC.,

Intervenors.

ON PETITIONS TO REVIEW AND ON APPLICATIONS TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

SHIPPING GROUP'S REPLY BRIEF

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Petitioners,

and

HOUFF TRANSFER, INC., AMERICAN WAREHOUSEMEN'S ASSOCIATION and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenors,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Intervenors.

ON PETITIONS TO REVIEW AND ON APPLICATIONS TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

SHIPPING GROUP'S REPLY BRIEF

As to the Trucking Group:

The NLRB's and Shipping Group's principal briefs leave no doubt that the Rules on Containers are lawful work preservation provisions on their face. These briefs dispose of the contentions advanced by the Trucking Group.

The work preservation argument that the Trucking Group urges depends upon the existence of a "new intermodal transportation system" into which it claims that the work of stuffing and stripping the longshore employers' containers has been inseparably integrated (Trucking Group's Brief ("TGB") at 12-31). Both the ALJ and the

Board found otherwise (Bd at 16 (A. 163); ALJ at 31-37 (A. 44-50)). Their factual determinations are supported by an abundance of record evidence (A. 254, 258, 266-67, 322, 342-43, 351-52, 383-89, 426-28, 432-33, 452-54, 469-71, 545, 598-99). Moreover, the Trucking Group's argument has already been rejected by the District of Columbia Circuit. *International Longshoremen's Association* v. *NLRB ("ILA")*, 198 U.S. App. D.C. 157, 613 F.2d 890, 909-10 & n.173 (1979), *aff'd*, 447 U.S. 490 (1980). The Trucking Group's obstinate adherence to its discredited theory is futile.

The Trucking Group's right of control argument rests upon two fictions. First, it claims that the Board never considered the right of control issue (TGB at 32-37)—an untenable contention in light of the ALJ's careful analysis (ALJ at 58-60, 75 (A. 71-73, 88)), which was adopted by the Board (Bd at 18 n.30 (A. 165)). Second, the Trucking Group's invocation of contractual common-carrier obligations (TGB at 37-45) would require the NLRB to determine the validity of the Rules on Containers under federal shipping law—an endeavor the Federal Maritime Commission has not yet been able to complete to the satisfaction of an appellate court.[1] The Board correctly declined to trespass upon an area beyond its jurisdiction, *Local 1976, Carpenters* v. *NLRB ("Sand Door")*, 357 U.S. 93, 110-11 (1958), and rightfully branded any linkage of the outcome of this labor law case to the uncertainties of pending FMC litigation "mischievous." (ALJ at 72 (A. 85)).

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[1] *Sea-Land Service, Inc.—Proposed Rules on Containers*, 21 F.M.C. 1 (1978), *aff'd in part and remanded in part sub nom. Council of North Atlantic Shipping Associations* v. *FMC*, 217 U.S. App. D.C. 318, 672 F.2d 171, *cert. denied*, 103 S. Ct. 69 (1982), *on remand* Nos. 73-17 & 74-40 (FMC May 19, 1982), *vacated and remanded*, No. 78-1776, Supplemental Opinion Following Remand (D.C. Cir. July 2, 1982), *reh'g en banc denied*, No. 78-1776 (D.C. Cir. Sept. 23, 1982).

As to the NLRB:

The only real issue in this case is the legal soundness of the Board's trucking and warehouse rulings. The NLRB's brief ("NB") leaves no doubt that this issue is purely one of law (NB at 50-54).

1. *The Board's Decision*

The Board's ruling invalidated application of the Rules to certain trucking and warehouse operations purportedly because it was work acquisition (Bd at 26-27 (A. 173-74)). The Shipping Group's Brief ("SGB") showed that the conclusion of work acquisition was a mere assumption unsupported by any finding of fact or record evidence (SGB at 42-49). Indeed, the Shipping Group demonstrated that the stripping/stuffing of containers at the piers can in no way lessen the work performed by trucking or warehouse employees at off-pier sites (SGB at 42-46). Since, without work loss, there can be no acquisition, the Shipping Group exposed the Board's finding of illegality as one predicated solely on its conclusion that longshore work has been "eliminated." (SGB at 47-48).

The Board's brief to this court concedes the correctness of the Shipping Group's analysis. The NLRB has now abandoned any pretense of work acquisition. The word "acquisition" appears four times in the 64 pages of the Board's brief (NB at 23, 39, 49), but only once in connection with the Board's decision in this case (NB at 49). Even here, it is not given its ordinary meaning. It is dressed up in quotation marks, suggesting that the Board in its decision did not mean that longshoremen were in fact acquiring work in the real world but, rather, used the term "acquisition" as a technical catchword to denote unlawful activity.

Just as in the Board's and ALJ's decisions work acquisition is an assumption, not a finding of fact, so too

in the Board's brief to this court. There is not a single citation in that brief to any record evidence in support of a factual finding that application of the Rules to truckers and warehousemen caused longshoremen to acquire the off-pier employees' work. If work acquisition had really been a factual determination in its decision, one would expect the Board to point to those portions of the record that support its finding. After having received the Shipping Group's brief, which openly challenges any claim that off-pier work is being acquired, surely the Board's brief would have responded by supplying the missing evidentiary support. It does not because none exists. Instead, the Board jettisons "work acquisition" as a necessary element and now seeks to persuade this court that work "elimination" alone suffices to overcome the Board's own determination that the Rules are generally valid work preservation provisions.

The Board's brief confirms the Shipping Group's demonstration that the decision under review is predicated on the principle of law that eliminated work may not be the subject of a lawful work preservation agreement. The Board's brief states that "agreements to cease doing business in connection with claiming work that technology has eliminated are not primary agreements." (NB at 52). This is an error of law.

The Board cites no authority in support of its theory because neither the NLRB itself nor any judicial tribunal has ever endorsed it. The controlling authorities have consistently upheld agreements to preserve or reacquire eliminated work. *National Woodwork Manufacturers Association* v. *NLRB,* 386 U.S. 612 (1967), *aff'g in part and rev'g in part* 354 F.2d 594 (7th Cir. 1966); *American Boiler Manufacturers Association* v. *NLRB,* 404 F.2d 547 (8th Cir. 1968), *cert. denied,* 398 U.S. 960 (1970); *Meat Drivers*

Local 710 v. *NLRB*, 118 U.S. App. D.C. 287, 335 F.2d 709 (1964).

2. *The Board's Brief*

The Board's decision in this case rests upon the naked assertion that the attempt to preserve eliminated work is illegal work acquisition (Bd at 27 (A.174)). In an effort to rescue this implausible postulate, the Board's counsel goes to even more extreme lengths, which, rather than salvage the Board's decision, actually underscore its fundamental infirmities. The Board's counsel conjures up something old and something new. He introduces a distinction never before voiced and dredges up an old discredited theory. Neither of these appear in the Board's decision.[2]

First, the Board's brief attempts to undermine the well-established law of work preservation by introducing a spurious distinction never before drawn either in the decision on review or in any prior case. The Board's counsel claims that the legality of the agreement turns on whether the work has been "eliminated" or "diverted." (NB at 52). This semantic game is devoid of legal significance.[3] From the point of view of the workers, it matters not whether the work has been transferred to another work site or gone to the Valhalla of the victims of tech-

[2] These *post hoc* rationalizations by agency counsel are unacceptable to support the decision on review. *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 397 (1974); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-69 (1962); *Edward J. DeBartolo Corp.* v. *NLRB*, 662 F.2d 264, 271-72 n.6 (4th Cir. 1981). An appellate court must adjudge an administrative decision on the basis of the reasons articulated in the agency's decision itself. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *Austin* v. *Jackson*, 353 F.2d 910, 912 (4th Cir. 1965).

[3] Board counsel's distinction is logically distorted. Manifestly, attempts to reinstate "diverted" work require a greater involvement of third parties than the resuscitation of "eliminated" work. Both are lawful work preservation, but the former is nearer the dividing line between primary and secondary activity.

nology. In either case, their work is lost, and the workers' efforts to compel their employer to return it are primary.

The controlling cases simply do not bear out Board counsel's attempted distinction. The Supreme Court in *National Woodwork* did not speak in terms of "diverted" or "displaced" work, but rather "employers' efforts to *abolish* . . . jobs." 386 U.S. at 640 (emphasis added). So too, the Eight Circuit in *American Boiler* and the District of Columbia Circuit in *Meat Drivers* sanctioned the recovery of *"lost"* work. 404 F.2d at 554; 335 F.2d at 712 (emphasis added). Moreover, the facts in these cases reveal that the work in controversy had been eliminated, not merely diverted. In *National Woodwork,* the work of cutting and fitting blank doors had been integrated into the manufacturing process. There were no carpenters at the manufacturers' plants to whom the work was diverted. The machines produced doors already fitted to their jambs. The work of mortising, routing and beveling had been eliminated by the prefabrication technology. The prepackaged boilers in *American Boiler* had the same work elimination effect. The manufacturing process had abolished, not diverted, the plumbers' on-site trimming work.

In *Meat Drivers,* the work of distributing meat products within the 50-mile Chicago area from a metropolitan processing plant had been eliminated by the establishment of a suburban plant. Distribution from the city plant was no longer a necessary step in the process of getting the meat from the suburban plant to the Chicago customers. The court of appeals upheld an agreement requiring the employer to have the meat transported first to the city plant thence to the customers by its employees at that plant rather than directly from the suburban plant to the customers by independent over-the-road truckers retained by the employer. *Meat Drivers* is particularly instructive

because it demolishes the Board's attempt in this case to introduce "duplication" as a disqualifying factor (Bd at 26-27 (A. 173-74)). Obviously, delivery directly from the suburban plant was a more economical, convenient and efficient practice. Transfer to the city plant was a duplicative, make-work step. Nevertheless, the city employees' insistence that it be done to reintroduce their lost work was lawful, primary activity, even though it had the effect of disrupting the employer's arrangements with the over-the-road contractors.[4]

Second, the Board's brief reaches back to an earlier era to urge that it is the "cease doing business" factor which makes the attempt to preserve eliminated work unlawful (NB at 53 and n.43). The case cited for this proposition, *Painters & Paperhangers Local 27 (Glaziers) (Joliet Contractors Association)*, 99 N.L.R.B. 1391 (1952), *aff'd sub nom. Joliet Contractors Association* v. *NLRB*, 202 F.2d 606 (7th Cir.), *cert. denied*, 346 U.S. 824 (1953), was decided not only prior to *National Woodwork* but also before the 1959 amendments to § 8(b)(4) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 158(b)(4) (1976), which introduced the proviso "that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."[5]

Prior to the enactment of the primary proviso, it was tenable to suggest that a violation could be predicated on a mere cessation of business. Indeed, the Seventh Circuit in reviewing *Glaziers* said "we are not convinced that

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[4] The Board itself reached a similar result in *Plumbers Local 636 (Mechanical Contractors Ass'n)*, 189 N.L.R.B. 661 (1971) where a duplicative practice of disassembling and repiping prefabricated units was upheld as valid work preservation.

[5] The courts extended this primary proviso to agreements challenged under LMRA § 8(e), 29 U.S.C. § 158(e) (1976). *See National Woodwork*, 386 U.S. at 634-43.

a Union violation . . . is dependent upon whether its activities are primary or secondary." 202 F.2d at 610. Once Congress passed the proviso, however, *Glaziers* lost all precedential value, and a different mode of analysis was mandated.[6]

Under the present state of the law, three elements are necessary to establish a violation of LMRA § 8(b)(4) or § 8(e): (1) inducement (threats or coercion), (2) cessation of business, and (3) secondary objective. While it is still necessary to find a cessation of business, that element is no longer determinative. It must be shown that the cessation is a result of secondary, not primary, activity. The primary/secondary analysis is the crucial touchstone, and it is totally independent of the cessation of business element. The primary/secondary determination turns upon the motivation for the cessation. Where the cessation is the result of primary activity, no violation occurs. Thus, the Supreme Court has repeatedly held that the effect on third parties, *i.e.*, the cessation of business, "no matter how severe, is irrelevant to the validity of the agreement so long as the union had no forbidden secondary purpose to affect the employment relations of the neutral." *ILA*, 447 U.S. at 507 n.22, *citing NLRB* v. *Enterprise Association of Steam, etc. Pipefitters*, 429 U.S. 507, 510, 526 (1977); *see also National Woodwork*, 386 U.S. at 627.[7]

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[6] In its later determination in *National Woodwork*, the Seventh Circuit itself recognized the obsolescence of its prior affirmance of *Glaziers*. 354 F.2d at 598.

[7] This same analysis has been articulated by the Supreme Court:

> Under § 8(b)(4)(B) of the National Labor Relations Act, 29 USC § 158(b)(4)(B), a union commits an unfair labor practice when it induces employees to refuse to handle particular goods or products or coerces any person engaged in commerce, where 'an object' of the inducement or coercion is to require any person to cease doing business with any other person. A proviso, added to § 8(b)(4)(B) in 1959, declares that the section 'shall [not] be construed to make

(Footnote Continued on Succeeding Page)

The theory now proposed by the Board's counsel, which makes the cessation of business the crucial factor, would in effect repeal the primary proviso. Since even the most pristine primary work preservation agreement has some effect on third parties, which, as the Board reminds us, is sufficient to make out a cessation of business (NB at 29 n.26, *citing NLRB* v. *Local 825, Operating Engineers,* 400 U.S. 297 (1971)), virtually every work preservation agreement would be vitiated if Board counsel's view were to prevail.[8]

Board counsel's attempts to buttress the decision under review are unavailing. His diversion/elimination distinction and "cessation of business" theory are contrary to well-established precedent and to the express provisions of the statute. However, they serve one useful purpose. They betray a recognition that the Board's decision as ren-

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> unlawful, where not otherwise unlawful, any primary strike or primary picketing.' Although without the proviso the section on its face would seem to cover any coercion aimed at forcing a cessation of business, the National Labor Relations Board (Board) and the judiciary have construed the statute more narrowly, both before and after the proviso was added, to prohibit only secondary, rather than primary, strikes and picketing.
>
> Among other things, it is not necessarily a violation of § 8(b)(4)(B) for a union to picket its employer for the purpose of preserving work traditionally performed by union members even though in order to comply with the union's demand the employer would have to cease doing business with another employer.

Pipefitters, 429 U.S. at 509-10 (footnotes and citation omitted).

[8] The change in business practices which would constitute the "cessation of business" element of the Board's trucking and warehouse rulings in this case is minimal. It consists of the delivery of cargo to off-pier sites in a truck rather than a steamship carrier container. To the off-pier employees the vehicle in which the cargo is transported makes no difference. Their work is the same in either case. The change in business practices is so slight and insubstantial as to place in doubt whether the "cessation of business" element has in fact been established. *See Operating Engineers, supra,* 400 U.S. at 305. If the alleged "cessation" in this case suffices, what work preservation agreement could survive?

dered needs shoring. The fact that the best support Board counsel was able to devise is insufficient shows that the decision is indefensible.

3. *The Controlling Law*

The Board's trucking and warehouse rulings are unable to withstand scrutiny under the basic principles of the work preservation doctrine. In this case, however, there is a more definitive standard—the Supreme Court's decision in *ILA*, which dealt with this very litigation. The Board's rulings part company with *ILA* in every respect. The *ILA* Court admonished the Board for erroneously focusing "on the work done by the employees of the charging parties, the truckers and consolidators, after the introduction of containerized shipping." *Id.* at 507.[9] In its trucking and warehouse rulings, the Board continues to define the work in dispute as the post-containerization work performed by the trucking and warehouse employees (Bd at 24 (A. 171)).[10]

The *ILA* Court required the Board to focus on the longshoremen's work prior to the innovation and to evaluate the

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[9] Neither the Supreme Court nor the District of Columbia Circuit in *ILA* nor any other tribunal which has addressed this case has ever made any distinction between application of the Rules to consolidators and their application to truckers and warehousemen. The reason is self-evident. The traditional work of longshoremen and the on-pier work the Rules seek to retain are the same whether the container comes from/goes to a consolidator, NVO, trucker or warehouseman. Regardless of the off-pier entity, the longshoremen perform the same work. The test in each instance remains the same: whether that work is historically and functionally related to traditional longshore work, and the Board has answered that question in the affirmative.

[10] Even if the Board's "elimination" theory were not legally erroneous, it would still be reversible error for the Board to apply that theory in this case. The Board disregards the Supreme Court's direction. It views the Rules on Containers in hindsight. While it is true that containerization had the potential for eliminating longshore work, this elimination with respect to warehousing and shortstopping had not occurred at the time that the Rules were adopted in 1969. From the inception of containerization un-

(Footnote Continued on Succeeding Page)

functional and historical relationship between this traditional longshore work and the work retained by the Rules. 447 U.S. at 507, 509-10. In its trucking and warehouse rulings, although it had already found that the work the Rules propose to preserve is functionally and historically related to traditional longshore work and has not been integrated into off-pier work practices (Bd at 16, 24-27 (A. 163, 171-74); *see also* NB at 34-37), the Board simply eschewed these critical findings and embarked upon its "elimination" theory.

The Board's theory cannot be reconciled with *ILA*. The Supreme Court recognized that the need for longshore work had been eliminated by containerization, 447 U.S. at 509, but did not consider this elimination to be a determinative factor. The Court mandated a further inquiry:

> whether the historical and functional relationship between this retained work and traditional longshore work can support the conclusion that the objective of the agreement was work preservation rather than the satisfaction of union goals elsewhere.

447 U.S. at 510 (footnote omitted). The Court thus zeroed in on the key factor for determining a violation of §§ 8(b)(4) and 8(e): whether the challenged agreement has a primary or secondary objective—an inquiry the Board

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til the 1973 Dublin Supplement, containers destined for stripping at local warehouses and trucking stations were routinely stripped at the piers (A. 1082-83, 1085-86, 1159-60, 1181). In the Dublin Supplement, the longshoremen agreed not to strip warehouse-bound containers but only on the condition that their contents be genuinely warehoused for the customary 30-day period. It was to preserve this work from elimination that the Rules were adopted. Any elimination that may have occurred thereafter resulted from 10 years of injunctions, not from "the technology, as the ILA agreed to have it operate." (NB at 49). Thus, the "elimination" upon which the Board's theory depends did not exist at the time the agreement was adopted, the temporal context in which, under the Supreme Court's decision, the Rules must be adjudged.

completely loses sight of in concocting its elimination theory.

The Supreme Court has repeatedly said that the "touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." *National Woodwork,* 386 U.S. at 645 (footnote omitted); *Pipefitters,* 429 U.S. at 511; *ILA,* 447 U.S. at 504. The Board had no difficulty finding that the agreement to have longshoremen stuff and strip their own employers' containers at their own employers' premises "had an overall work preservation objective." (Bd at 25 (A. 172)). The touchstone, therefore, was completely satisfied. In its trucking and warehouse rulings, the Board does not mention the touchstone. It offers no explanation how the longshoremen's "valid work preservation objective" becomes secondary when their agreement is applied to warehousemen and truckers. The fact that in those instances the Board believes the work has been "eliminated" in no way changes the primary nature of the agreement. The longshoremen are still bargaining with their own employers to have them revive the lost work. If, as the Board suggests, the work has in fact been eliminated, no other employees can be doing it. The longshoremen's agreement, then, cannot be "tactically calculated to satisfy union objectives elsewhere." *National Woodwork,* 386 U.S. at 644. Nothing can be more primary than an agreement to preserve "eliminated" work.

The only way such an agreement could become secondary would be if its application reached out to acquire other employees' work not previously performed by the contracting employees. *National Woodwork,* 386 U.S. at 630-31 and at 648 (Harlan, J. concurring). In this case, unlawful acquisition could occur only if the longshoremen's work had become inseparably integrated into the work of the off-pier employees—which the Board in this case found not to be the fact (Bd at 16, 24-27 (A. 163, 171-74); ALJ

at 31-37 (A. 44-50)).[11] The Board's decision did not find, nor does the Board's brief claim, that any off-pier work is being transferred to the docks by application of the Rules. *See* pp. 3-4 *supra*. The invocation of "elimination" does not supply the necessary secondary element.

The Board recognizes that acquisition is necessary. The bottom line of its decision is, "Therefore, we conclude that the Rules on Containers as applied to shortstopping and traditional warehousing practices have an illegal work acquisition objective." (Bd at 27 (A. 174)). However, in the light of its own factual findings, the Board cannot say that the work of off-pier employees is being acquired. Rather, it attempts to justify its decision by labelling as "acquisition" the attempt to retain "work that the technology, as the ILA agreed to have it operate, 'eliminated the need for.'" (NB at 49). This "eliminated" work is longshore work, not off-pier work. Unlawful acquisition occurs only when the work acquired is someone else's. Only then is it secondary. Acquiring one's own work is quintessentially primary. Indeed, it is not acquisition at all. It is work preservation.

The Board attempts to stigmatize this perfectly lawful conduct by expanding the term "acquisition" to include that which it has never meant in a manner that obliterates the distinction between primary and secondary. The Board appeals to this court to defer to the Board's discretion (NB at 51, 53). But judicial deference is neither absolute nor blind. *NLRB* v. *Brown*, 380 U.S. at 278, 292 (1965); *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). It does not include sanctioning an Orwellian perversion of the plain meaning of the language which, if unchecked, would abolish the doctrine of work preservation.

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[11] The opponents of the Rules have always recognized the need for integration to invalidate the Rules. They have always predicated their challenge on the contention, albeit fallacious, that longshore work has been inseparably integrated into the "new intermodal transportation system." *See, e.g.*, TGB at 17.

CONCLUSION

For the foregoing reasons and those set forth in the Shipping Group's Principal Brief, the Board's trucking and warehouse rulings should be reversed, the applications for enforcement in Nos. 83-1424 and 83-1486 denied, and the Rules on Containers declared lawful work preservation agreements in their entirety.

Dated: New York, New York
October 17, 1983

Respectfully submitted,

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Nos. 84-677, 84-684, 84-691, 84-696, and 84-869

In the Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN WAREHOUSEMEN'S ASSOCIATION, PETITIONER
v.
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, PETITIONER
v.
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

INTERNATIONAL ASSOCIATION OF NVOCCs, ET AL., PETITIONERS
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., PETITIONERS
v.
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

HOUFF TRANSFER, INC., PETITIONER
v.
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-677

AMERICAN WAREHOUSEMEN'S ASSOCIATION, PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

No. 84-684

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

No. 84-691

INTERNATIONAL ASSOCIATION OF NVOCCs, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

No. 84-696

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., PETITIONERS

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

No. 84-869

HOUFF TRANSFER, INC., PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

We have set forth the background of these cases in our petition in No. 84-861, *NLRB* v. *ILA*, which seeks review

of the same judgment of the court of appeals that is challenged by petitioners. These cases concern the Rules on Containers, which are part of collective bargaining agreements between the International Longshoremen's Association and shipping industry employers. The Rules are designed to deal with the effects of containerization on longshoremen's work. In *NLRB* v. *ILA (ILA I)*, 447 U.S. 490 (1980), this Court vacated two decisions of the National Labor Relations Board that had concluded that the Rules on Containers and their enforcement constitute secondary activity prohibited by Sections 8(b)(4) and 8(e) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(b)(4) and (e). On remand, the Board consolidated those two proceedings with seven other proceedings concerning the Rules on Containers. The Board concluded that the Rules violate the NLRA in their applications to a practice known as shortstopping and to certain traditional warehousing practices. The Board also concluded that the Rules are otherwise lawful. The court of appeals, disagreeing with the Board in part, held that the Rules are lawful in all respects. 734 F.2d 966; Pet. App. 40a-64a.[1]

In No. 84-861, we seek review of the court of appeals' decision insofar as it overturned the Board's ruling. Petitioners in Nos. 84-869 and 84-684 also seek review of this aspect of the court of appeals' decision. Petitioners in Nos. 84-677, 84-691, and 84-696 contend that the Rules violate the National Labor Relations Act in all their applications.

As we explain in our petition, the aspect of the court of appeals' decision that we challenge is inconsistent with the principles of this Court's decision in *ILA I*. See 84-861 Pet. 23-28. But as we also stated in our petition (84-861 Pet. 22,

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[1]"Pet. App." refers to the appendix filed jointly by petitioners in Nos. 84-677, 84-684, 84-691, and 84-696.

28) — and as this Court noted in *ILA I* (447 U.S. at 493; see *id.* at 494-496) — the legality of the Rules in all their applications is a question of great practical significance. The Rules are in effect in every major Atlantic and Gulf port. The Rules determine the extent to which shippers can take advantage of the potentially enormous savings made possible by the growth of containerization, and their enforcement will significantly affect the operation of the land-sea transportation system, the cost of that transportation to shippers and consumers, and the jobs of many of those employed in the industry. Moreover, controversies over the treatment of containers have been a frequent cause of industrial strife in the shipping industry; a definitive resolution of the validity of the Rules will promote stability in the collective bargaining process in the shipping industry. Accordingly, it would be appropriate for the Court to consider the legality of the Rules in their entirety rather than considering only particular applications of the Rules.

It is therefore respectfully submitted that the petitions for a writ of certiorari should be granted.

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JANUARY 1985

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